

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8929 of 1995

For Approval and Signature:

Hon'ble MS.JUSTICE R.M.DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?
1 TO 5 NO

SUDHABEN H PARIKH

Versus

SECRETARY SUMITRABEN THAKOR

Appearance:

MS SONAL D VYAS for Petitioner
MR AY PATHAN for Respondent No. 1
MR DA BAMBHANIA for Respondent No. 2
SERVED for Respondent No. 3

CORAM : MS.JUSTICE R.M.DOSHIT

Date of decision: 14/08/97

ORAL JUDGEMENT

The petitioner is an employee of the respondent No. 1 Institution [hereinafter referred to as the "Trust"] which is a Charitable Trust duly registered under the Bombay Public Trusts Act, 1950. She challenges the order made by the Director of Social Defence,

respondent No. 2 on 11th October, 1995 and consequential order made by the Trust on 12th October, 1995.

2. The facts leading to the present case are as under:

The trust is a voluntary Organisation rendering services to the society by extending help and aid to the women in need and social and economic support to such women. To assist the trust in its activities, the Government pays grant to the trust which covers the entire expenditure of the salary of the staff. With a view to regulating the grant given by the Government to the trust and such other institutions, the Government has framed grant in aid code, relevant portion of which is annexed to the petition at Annexure "E". Under the said Grant in Aid Code, power to create the posts and regulate the appointment of suitable persons on such posts has been conferred on respondent No. 2. However, power to appoint and take disciplinary action against such employees has been vested into the concerned Institution i.e. the Trust in the present case. Pursuant to the said powers, the Government under its order dated 1st January, 1991 created certain posts for the establishment of the Trust. One of such post being the post of Superintendent cum Probation Officer.

3. In the year 1975, the petitioner was appointed as a clerk by the Trust. In course of time, she was appointed as case worker. At the time, respondent No. 2 sanctioned the above referred post of Superintendent-cum-Probation Officer, the petitioner was serving as a case worker. The trust under its resolution dated 5th April, 1991 appointed the petitioner as a Superintendent-cum-Probation Officer. The said appointment was forwarded to respondent No. 2 for his sanction. Initially, her appointment was sanctioned for the period upto 31st July, 1992 which sanction was extended by various orders issued from time to time upto 31st March, 1995. It appears that one Ms. Sandhyaben Upadhyay was appointed as Secretary of the Trust by the Government. Said Sandhyaben had certain complaints against the working of the petitioner herein and such complaints were reported to respondent No. 2. Respondent NO. 2 appears to have investigated into such complaints and having found them to be genuine, issued a show cause notice to the trust as well as to the petitioner calling upon them to show cause why the petitioner's appointment as Superintendent cum Probation Officer should not be sanctioned. The petitioner submitted her reply to the said show cause notice and

feeling aggrieved, she preferred writ petition being Special Civil Application NO. 2468 of 1995 which was dismissed by this Court on 10th October, 1995 as being premature. On 11th October, 1995, respondent No. 2 made the impugned order approving the appointment of the petitioner as Superintendent-cum-Probation Officer till 11th October, 1995 for the purpose of grant. Consequently, the trust made the impugned order on 12th October, 1995. Since prior to her appointment as Superintendent-cum-Probation Officer, the petitioner was serving as a case worker, under another order dated 12th October, 1995 made by the Trust, the petitioner was appointed as a case worker with effect from 12th October, 1995. Feeling aggrieved, the petitioner has preferred this petition.

4. Learned advocate Ms. Vyas appearing for the petitioner has raised the following contentions :

- (a) Under the provisions contained in the Grant in Aid Code, power to appoint and take disciplinary action against the employees of the grant in aid institution vested into the Institution and respondent No. 2 could not have taken any action against the petitioner. The impugned order dated 11th October, 1995 made by respondent No. 2 is, therefore, contrary to the provisions contained in the Code and the principles of natural justice and is violative of the fundamental rights enshrined under Articles 14 and 16 of the Constitution.
- (b) The petitioner holds a civil post under the State Government and before removing the petitioner from the post of Superintendant cum Probation Officer, fulflaged inquiry as contemplated under Article 311 of the COnstitution should have been conducted. The impugned order dated 12th October, 1995 is, therefore, violative of Article 311 of the Constitution and is, thus, vitiated.
- (c) The impugned order dated 11th October, 1995 is arbitrary and is actuated by malafide since the said order was made, a day after the writ petition preferred by the petitioner was dismissed on 10th October, 1995.

5. Ms. Vyas, has submitted that the trust renders social services and the activities undertaken by the trust are in furtherence of the State Policy contained in Article 38 of the COnstitution and, therefore, the trust

is an instrumentality of the State. Further, the Trust receives 100 percent grant for the expenditure incurred on the staff salary and, therefore, the trust is an "other authority" within the meaning of Article 12 of the Constitution and is amenable to the writ jurisdiction of this Court. She has submitted that before making the impugned order, no show cause notice was issued to the petitioner, no explanation was sought from her, no inquiry was held against her and, therefore, the impugned orders having been made in violation of the principles of natural justice, are vitiated. She has relied upon the judgment of the Supreme Court in the matter of Sukhdevsingh and others versus Bhagatram Sardarsinh, [AIR 1975 SC 1331] and has submitted that the provisions contained in the Code are statutory in nature and the petitioner enjoyed a statutory status and her removal from the post being in contravention of the provisions of the Code, she is entitled to a declaration of being in employment on the said post.

6. Learned Additional Government Pleader Mr. Bambhaniya has appeared for the respondent No. 2 and has submitted that it is the Trust which receives grant from the Government and any decision in respect of the grant payable to the trust, if contrary to the interest of the trust, shall be challenged by the trust alone. The petitioner has no locus to claim grant from the Government. He has submitted that the Government does not exercise any administrative or pervasive control over the administration of the trust. The only control that is exercised by the Government is that of regulating staffing pattern so as to ensure full utilisation of the salary grant paid by the Government. The trust, therefore, cannot be said to be the "other authority" within the meaning of Article 12 of the Constitution and is not amenable to the writ jurisdiction of this Court. In support of his contentions, he has relied upon the judgment of this court in the matters of P.K.KHALSA VS THE GUJARAT STATE SOCIAL WELFARE ADVISORY BOARD & ANR [1995 (1) GLH 339]; V.I.KHALIFA VS SATUBHA TANUBHAI VAGHELA [1988 (1) GLR 679]; and Dr. C.A.SHAH VS GUJARAT CANCER & RESEARCH INSTITUTE, AHMEDABAD [1992(1) GLR 687]. I should consider whether the trust can be said to be "other authority" within the meaning of Article 12 of the Constitution and whether the trust is amenable to the writ jurisdiction under Article 226 of the Constitution. It may be noted that as it is evident from the provisions of the Code, the Government does not exercise all pervasive administrative control over the administration of the trust. Ms. Vyas has fairly conceded that though the trust receives 100 % grant for salary expenditure ,

the trust does receive other income from other sources. The Code is nothing but the instructions issued with a view to regulating the grant paid by the Government to various institutions. The said instructions are not issued in exercise of power conferred under some statute. In my view, the said instructions do not partake statutory character as is averred by Ms. Vyas. Further, it is true that the trust does render social services. However, same cannot be said to be an instrumentality of the State. The trust is not a statutory establishment or creature of any statute nor does it perform any Governmental function. In the matter of Sukhdevsingh [supra], the Court was considering the status of the employees of ONGC, LIC of India and the Industrial Finance Corporation which were declared to be the 'other authorities' within the meaning of Article 12 of the Constitution. All the said three Corporations were the statutory corporations established under the statute and were liable to perform the statutory obligations. It was in those circumstances that the Court held that the employees of the said corporations had a statutory status. In my view, the principles laid down in the said judgment shall have no applicability to the facts of the present case. I am, therefore, of the opinion that neither the petitioner enjoyed statutory status nor the instructions contained in Grant-in-aid Code are of statutory nature. In the matter of P.K.Khalsa [supra], a similar question was posed before the Court whether the Gujarat State Social Welfare Advisory Board can be said to be "other authority" within the meaning of Article 12 of the Constitution. After discussing various judgments of the Supreme Court rendered in this behalf, the Court, in paragraph 13 of the judgment, extracted the principles as under. The Court held that;

"The State control, however vast and pervasive is not determinative. Similarly, financial contribution by the State is also not conclusive. However, the combination of the State aid called that unusual degree of control over the management and the policy of the body and rendering of an important public service being obligatory function of the State may largely point out that the body is a 'State' ".

In the matter of V.I.Khalifa (Supra), this court was considering whether a co-operative society can be said to be a "State" within the definition of 'State' under Article 12 of the Constitution of India. The court took into consideration the factum of 1/3rd share capital

of the society held by the Government and the number of Directors nominated by the Government. The court, however, held that there was no over-riding administrative control exercised by the Government. Considering the lack of administrative control, the court held that the co-operative society was not an instrumentality of the State and was not a "State" within the meaning of Article 12 of the Constitution. So far as the maintainability of the writ petition against the said society was concerned, the court held that, "even assuming for an argument's sake that the respondent is a public utility service, issuance of the writ under Article 226 would not be justified for remedying a private wrong ". In the matter of Dr. C.A.Shah (Supra), this court was again confronted with the question whether the respondent-Institute which was a co-operative society, could be said to be the "other authority" within the meaning of Article 12 of the Constitution. The court, considering certain pronouncements of this court as well as of the Supreme Court, summarised the principle in paragraph-21 of the judgment. The court laid down various tests which are required to be answered while considering whether an Organisation can be said to be the "other authorities" as envisaged by Article 12 of the Constitution. The factors which led the court to hold that the respondent-society was not a "State" as envisaged in Article 12 of the Constitution were that (a) the Institute did not owe its existence through any statute; (b) it received income from other sources (donation) over and above Government grant; (c) it is administered by the Governing Board; (d) Government does not exercise administrative control. If the above referred tests are applied, in my view, the Trust can not be said to be an instrumentality of the State or an "other authority" as envisaged in Article 12 of the Constitution. As referred to hereinabove, the Trust is a Public Charitable Trust duly registered under the Bombay Public Trusts Act; it receives income from the sources other than the Government grant; administrative control is with the Board of Trustees and the Government does not exercise administrative control over the Trust; it is not established under any statute, nor does it perform any Governmental functions. Besides, the present petition preferred for individual claim of the petitioner, I am, therefore, of the view that neither the Trust can be said to be the "other authorities" within the meaning of Article 12 of the Constitution, nor it can be said to be performing any public duty, nor is it amenable to writ jurisdiction of this court.

7. It is undisputed that the petitioner was

appointed as Superintendent-cum-Probation Officer by the Trust, which was approved by the Government for a limited period. The Government was considering whether her appointment should be approved for a further period. While considering the said question, the respondent No.2 took into consideration the performance of the petitioner. Since the performance of the petitioner was not found to be satisfactory, the respondent No.2 issued a notice to the petitioner seeking an explanation from her. Having considered her explanation, the respondent No.2 was of the view that the petitioner's appointment was not required to be approved. Eventually, the impugned order was made on 11th October, 1995. Whether or not to approve an appointment is entirely an administrative function of the respondent No.2 and the same could have been performed by taking into consideration the relevant material, performance of the petitioner as Superintendent-cum-Probation Officer being one of the relevant factors. While considering this question, the petitioner was not required to be afforded an opportunity of hearing nor the said order can be said to be punitive in any manner and did not call for any inquiry as is averred by Miss Vyas. It can not be said that the petitioner was not afforded an opportunity of being heard. As observed hereinabove, the petitioner was called upon to submit her explanation and the impugned order was made after considering the explanation submitted by the petitioner. The order not being one of punishment, no disciplinary proceeding was required to be held against the petitioner. The impugned order, therefore, can not be said to be violative of principles of natural justice as averred by Miss. Vyas.

8. The petitioner being an employee of the Trust, she can not be said to be a civil servant or holder of a civil post under the State Government. In my view, therefore, the provisions contained in Article 311 of the Constitution of India are not attracted . Mr. Bambhaniya, the learned AGP is also right in contending that the petitioner has no locus to claim grant from the Government. The Government pays grant to the Institution and if the grant is withheld or refused, the Trust would have right to challenge such decision. In the present case, the Trust has not challenged the action of the respondent No.2 and the petitioner could not have challenged the impugned order dated 11th October, 1995 made by the respondent No. 2. I also can not hold that the impugned order dated 11th October, 1995 is malafide because the same was made the day after the earlier petition preferred by the petitioner was dismissed. In view of the above discussion, the impugned order dated

11th October, 1995 can not be said to be bad or illegal or arbitrary or unconstitutional.

9. The next question that arises is whether the Trust was justified in making the impugned order dated 12th October, 1995. Since I have held that the Trust is not a "state" or "other authority" as envisaged under Article 12 of the Constitution and that it is not amenable to the writ jurisdiction of this court, I do not deal with this question. Petitioner may pursue any remedy that may be available to her against the Trust.

10. Petition is, therefore, dismissed. Rule is discharged. There shall be no order as to costs.

VJ